IN THE CIRCUIT COURT OF TENNESSEE
SIXTEENTH JUDICIAL DISTRICT AT MURFREESBORO

RANDY RAY MCFARLIN,	)	
A.K.A. MAC RAY MACFARLANE,	)	
	)	
Petitioner,	)	
	)	**NO. 68808**
v.	)	
	)	**(POST-CONVICTION)**
STATE OF TENNESSEE,	)	
	)	
Respondent.	)	

ORDER DENYING POST-CONVICTION RELIEF

This matter came on to be heard on July 17, 2013, upon the Petition for Relief from Convictions or Sentence filed by RANDY RAY MCFARLIN (A.K.A. MAC RAY MACFARLANE) on October 2, 2012. After examining the Petition and other records relating to Petitioner's conviction in Case No. F-61796, and further considering the testimony of the Petitioner and trial counsel, and arguments of counsel, the Court hereby DENIES post-conviction relief in accordance with the following findings of fact and conclusions of law:

I. LAW

The Sixth Amendment of the U.S. Constitution and Art. I, Section 9 of the Tennessee Constitution both guarantee the right to "reasonably effective" assistance of counsel, which is assistance that falls "within the range of competence demanded of attorneys in criminal cases." Strickland v. Washington, 466 U.S. 668, 687 (1984); *see also* Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975).

In order to prevail on a claim of ineffective assistance of counsel, the petitioner must establish two prongs: (1) that counsel's performance was deficient; and (2) that the deficient performance prejudiced the defense. Strickland, *supra*, at 687. The petitioner's failure to establish either prong is fatal to a claim of ineffective assistance of counsel. Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

To establish the first prong of deficient performance, the petitioner must demonstrate that the attorney's "acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." Vaughn v. State, 202 S.W.3d 106, 116 (Tenn. 2006) (internal quotation marks and citation omitted). Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law. Baxter, *supra*, at 934-35. A reviewing court "must be highly deferential and must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." State v. Honeycutt, 54 S.W.3d 762, 767 (Tenn. 2001) (internal quotations and citation omitted). Counsel will not be deemed ineffective merely because a different strategy or procedure might have produced a more favorable result. Rhoden v. State, 816 S.W.2d 56, 60 (Tenn. Crim. App. 1991).

To establish the second prong of prejudice, the petitioner must prove a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Vaughn, *supra*, at 116. A "reasonable probability" is a probability that is sufficient to undermine confidence in the outcome. Strickland, *supra*, at 694.

In a post-conviction relief evidentiary hearing, the petitioner has the burden of proving the allegations of fact by "clear and convincing evidence." T.C.A. § 40-30-110(f). Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. Grindstaff v. State, 297 S.W.2d 208, 216 (Tenn. 2009). There is a rebuttable presumption that a ground for relief not raised before a Court of competent jurisdiction in which the ground could have been presented is waived. Id.

II. FACTS

In the case at bar, the Petitioner alleges that his trial counsel, Luke Evans, rendered ineffective assistance in connection with his trial by jury. Specifically, the Petitioner alleged that

Mr. Evans: (1) pressured him not to testify in his own defense[1]; and (2) failed to cross-examine certain witnesses sufficiently. Two additional grounds were raised in the Petition (i.e., the alleged impropriety of the trial court's decision to allow a clip from the movie *Miller's Crossing* to be played for the jury, and Mr. Evans' failure to raise an issue regarding the destruction of certain evidence in a Motion for New Trial), but the Petitioner conceded that these issues were decided on direct appeal by the Court of Criminal Appeals.

A. The Petitioner's Decision Not to Testify at Trial

The Petitioner testified that he and Mr. Evans had lengthy pre-trial discussions regarding whether or not he should testify. According to the Petitioner, Mr. Evans' pre-trial advice was always that he should testify, because juries "want to hear from an accused." The Petitioner stated that he and Mr. Evans never discussed his *not* testifying, until, during the trial, Mr. Evans told him that he had changed his mind in that regard, because there were certain "doors opened" for appeal during the course of the trial. The Petitioner acknowledged that Mr. Evans had prepared him to testify, and that he was comfortable with Mr. Evans as his attorney at the time of the trial. In addition, the Petitioner conceded that a Momon hearing was conducted during the trial, at which time he had a discussion with the trial judge regarding his decision not to testify. Ultimately, the Petitioner testified that it was his decision not to testify.

Mr. Evans testified that he was adequately prepared for trial in this case. Mr. Evans further testified that he generally prepares every client as if he or she is going to testify, but that it is solely the client's decision as to whether he or she will testify. In this case, Mr. Evans does not contest having a discussion with Mr. McFarlin in the courtroom regarding whether he should testify, but Mr. Evans denies ever telling the Petitioner, "I'm not putting you on the stand."

[1] This issue was not raised in the post-conviction petition, but the Petitioner's oral motion to amend the petition in this regard was not opposed by the State.

Rather, Mr. Evans asserts that he simply provided advice on this issue, and Mr. McFarlin made the decision.

B. Trial Counsel's Cross-Examination of the Witnesses

The Petitioner testified that Mr. Evans did not properly cross-examine certain witnesses, i.e., his ex-wives, called by the State. Although he did not provide specifics, the Petitioner complained that Mr. Evans thought it unwise, as a general proposition, to vigorously cross-examine a defendant's ex-wife. The Petitioner acknowledged that Mr. Evans did cross-examine all witnesses called by the State. Additionally, the Petitioner acknowledged that the State brought out the fact that the witnesses in question knew each other.

Mr. Evans testified that, during the course of a trial, he will typically ask his client whether there are any other questions that he or she would like each witness to be asked; however, for strategic purposes, Mr. Evans may decide not to ask certain questions. In the case at bar, Mr. Evans testified that every decision he made was done so in an effort to procure the Petitioner's acquittal.

III. ANALYSIS

This Court finds that the Petitioner has failed to meet his burden of showing, by clear and convincing evidence, that his trial counsel's performance was deficient. The Court specifically finds that Mr. Evans met the standard of reasonableness under prevailing professional norms, and credits the testimony of Mr. Evans over that of the Petitioner. With regard to the Petitioner's decision not to testify at trial, the Court finds that this decision was made solely by the Petitioner after consultation with and advice from Mr. Evans; the Court finds no proof that Mr. Evans pressured the Petitioner into making this decision. In fact, the Petitioner participated in a Momon hearing during the trial (as required by law), further demonstrating his understanding of his right to testify, and documenting his decision not to do so. With regard to the cross-examination of the State's witnesses, the Petitioner's vague assertion that Mr. Evans should have

been more vigorous is simply insufficient to meet the "clear and convincing" burden. It is undisputed that Mr. Evans cross-examined all witnesses called by the State, and that if he decided not to ask certain questions to certain witnesses, such was a calculated strategic decision made in an effort to procure the Petitioner's acquittal. Counsel will not be deemed ineffective merely because a different strategy or procedure might have produced a more favorable result. *See* Rhoden, *supra*, at 60.

As the Petitioner has failed to meet his burden under the first prong of the Strickland test, it is unnecessary to examine the second prong, and the Petitioner's claim must fail. *See* Goad, *supra*, at 370.

IV. CONCLUSION

Accordingly, the petition for post-conviction relief is not well-taken, and the same is hereby DENIED.

IT IS SO ORDERED.

/s/ [Original Signature on File at Clerk's Office]
M. KEITH SISKIN
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing Order has been mailed, postage prepaid, to the following:

J. Paul Newman, Esq.
Assistant District Attorney General
320 West Main Street, Suite 100
Murfreesboro, TN 37130

Carla Ford, Esq.
Attorney for Petitioner
212 South Academy Street
Murfreesboro, TN 37130

This the _____ day of _____, 20____.

_____
Deputy Clerk